IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 153.

LAMBERT RUN COAL COMPANY, *Appellant*,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, *Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR APPELLANT.

The argument for appellee opens with the contention, very briefly presented, that the District Judge erred in entering the injunction in this case without calling to his assistance two other judges, one of them a Circuit Judge, after notice to the Commission and to the Attorney General. The same contention is made at greater length in a brief for the United States, and in view of the form which it takes in the latter brief we deem it advisable to add to what was said upon this subject in our former argument.

This contention is of course based on the District Court Jurisdiction Act. If it were well founded—that is to say, if the case at bar were in fact a case in which that act required an application for temporary injunction to be heard by three judges, then the only course which this court can adopt is to reverse the decree of the Circuit Court of Appeals and remand the cause to that court with directions to dismiss the appeal, since the act expressly provides that the appeal from an order granting or denying an interlocutory injunction in cases which must be heard by three judges shall be to this Court, and the Court of Appeals was therefore without jurisdiction. 38 Statutes at Large, 219.

But it is quite clear that the application for the temporary injunction in this case was not within the Act. The provision with regard to temporary injunctions in that Act obviously applies only to injunctions sought in the "cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission," of which the Commerce Court was given exclusive jurisdiction by the Commerce Court Act.

That the case at bar was not brought to set aside or enjoin an order of the Interstate Commerce Commission within the meaning of the Commerce Court Act is conclusively established by the fact that, as the brief for the United States points out, the bill did not attack any order of the Commission, or pray any relief against such an order or, in fact, mention or refer to any such order. It was on its face purely a bill to enforce a statutory right, and it has been settled by an unbroken chain of decisions of this court, that when the question of jurisdiction depends upon the character of the suit,

that character is finally determined by the allegations of the plaintiff's pleading and can not be affected by anything alleged or set up as matter of defense.

See—

New Jersey Central R. R. Co. v. Mills, 113 U. S. 249.
Colorado Central Mining Co. v. Turck, 150 U. S. 138.
Tennessee v. Union and Planters' Bank, 152 U. S. 454.
Chappell v. Waterworth, 155 U. S. 102.
Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482.
Borgmeyer, Adms., v. Idler, 159 U. S. 408.
Oregon Short Line, etc., Ry. Co. v. Skottowe, 162 U. S. 490.
Press Publishing Co. v. Monroe, 164 U. S. 105.
Walker v. Collins, 167 U. S. 57.
Galveston, Harrisburg & San Antonio Ry. Co., v. Texas, 170 U. S. 226.
Florida Central & Peninsular R. R. Co. v. Bell, 176 U. S. 321.
Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185.
Boston & Montana Consolidated Copper and Silver Mining Co. v. Montana Ore Purchasing Co., 188 U. S. 632.
Louisville & Nashville R. R. Co. v. Mottley, 211 U. S. 149.
The Fair v. Kohler Die Co., 228 U. S. 22.
Healy v. Sea Gull Specialty Co., 237 U. S. 479.
American Well Works v. Layne, 241 U. S. 257.
Odell v. Farnsworth Co., 250 U. S. 501.

The ground upon which the rule established by these cases rests is clearly stated in *The Fair v. Kohler Die Co.*, 228 U. S. 22. In that case a bill was filed in a United States court praying an injunction against the sale by the defendant of certain articles, on the ground

that the articles were manufactured by plaintiff under a patent, were sold by plaintiff on condition that they should not be resold at less than one dollar and fifty cents, and that with notice of the condition, the defendant was selling them at one dollar and twenty-five cents, and was thereby infringing the patent. The defendant pleaded that it bought the articles from a jobber who had paid the plaintiff the full price, and that upon these facts the case presented no question arising under the patent law. The case was set down for hearing on the plea, and the court retained jurisdiction. The case went to the Supreme Court on the question of jurisdiction alone.

In disposing of this question Mr. Justice Holmes pointed out that the allegations of the plea must be taken to be true, but did not pass on the question whether they showed that the case did not present a question of infringement, because he held that the question of jurisdiction depended wholly on the allegations of the bill.

He said:

> "Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned. It was a resident of the same State as the defendant and could have had no other ground. In the earlier paragraphs of the bill it charged an infringement of its patent rights in general terms, and it sought triple damages, which it could have done only by virtue of the statute. It is true that later it set up the sale at a dollar and a quarter as an infringement and that we may guess that this is the only one, although it does not say so. *But if that is the plaintiff's only cause of action, still the plaintiff relies upon it as an infringement and nothing else—so that, good or bad, the cause of action alleged is a cause of action under the laws of the United States.*

> "*Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill.* THAT QUESTION CANNOT DEPEND UPON THE ANSWER, and accordingly jurisdiction cannot be conferred by the defence even when anticipated and replied to in the bill. *Devine v. Los Angeles*, 202 U. S. 313, 334. Conversely, when the plaintiff bases his cause of action upon an act of Congress jurisdiction can not be defeated by a plea denying the merits of the claim. It might be defeated, no doubt, in a case depending on diversity of citizenship by a plea to the citizenship of parties. *Interior Construction and Improvement Co. v. Gibney*, 160 U. S. 217, 219. We are speaking of a case where jurisdiction is incident to a Federal statutory cause of action. Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that it is good. See *Fauntleroy v. Lum*, 210 U. S. 230, 235.

In the subsequent case of *Healy* v. *Sea Gull Specialty Company*, 237 U. S. 479, the doctrine of this case was affirmed and restated by the same justice in the following language:

> "It may be that the reasoning of *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, is more consistent with that of Mr. Justice Bradley's dissent in *Hartell v. Tilghman*, 99 U. S. 547, 556 (a decision since explained and limited, *White* v. *Rankin*, 144 U. S. 628), than with that of the majority, but it is the deliberate judgment of the court and governs this case. *As stated there, the plaintiff*

is absolute master of what jurisdiction he will appeal to; and if he goes to the District Court for infringement of a patent, unless the claim is frivolous or a pretence, the District Court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious disputes. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. *Jurisdiction generally depends upon the case made and relief demanded by the plaintiff, and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defense* contained in what used to be the charging part of the bill. For the same reason it does not matter whether the validity of the patent is admitted or denied."

In *American Well Works* v. *Layne*, 241 U. S. 257, the court had occasion to consider the converse of the situation presented in the two cases just cited.

The case was a suit brought in a state court for damages alleged to have been suffered by plaintiff from statements by defendant that a pump manufactured by plaintiff infringed certain patents of defendant. The suit was removed to a United States Court and there dismissed on the ground that it was a case arising under the patent laws, and therefore not within the jurisdiction of the state court. The Supreme Court held that this was error.

Mr. Justice Holmes said:

"*Of course the question depends upon the plaintiff's declaration.* The *Fair v. Kohler Die Co.*, 228 U. S. 22, 25. That may be summed up in a few words. The plaintiff alleges that it owns, manufactures and sells a certain pump, has or has applied for a patent for it, and that the pump is known as the

best in the market. It then alleges that the defendants have falsely and maliciously libeled and slandered the plaintiff's title to the pump by stating that the pump and certain parts thereof are infringements upon the defendant's pump and certain parts thereof and that without probable cause they have brought suits against some parties who are using the plaintiff's pump and that they are threatening suits against all who use it."

In stating the reason for reversing the District Court he said:

> "A suit for damages to business caused by a threat to sue under the patent law is not iself a suit under the patent law. And the same is true when the damage is caused by a statement of fact —that the defendant has a patent which is infringed. What makes the defendant's act a wrong is its manifest tendency to injure the plaintiff's business, and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. A suit arises under the law that creates the cause of action. *The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract.* If the State adopted for civil proceedings the saying of the old criminal law; the greater the truth the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defense if the statement was made from disinterested malevolence."

It will be observed that in all material points this case was precisely like the case at bar. In each case it was claimed that the suit involved a question which

was by statute within the exclusive jurisdiction of the District Court. In the case at bar, as in the case cited, this question was not raised or presented by the plaintiff's pleadings. The plaintiff's bill states a case which, under *Pennsylvania R. R. Company* v. *Puritan Coal Mining Company*, 237 U. S. 121, and the other cases cited under Point III of our original argument, was clearly within the jurisdiction of the state court, and under the rule in the *Layne* case and the other cases cited, this established the jurisdiction of the state court in which the suit was brought and that of the District Court to which it was removed.

The fact that an order of the Commission was set up in the answer cannot oust the jurisdiction thus established. Under the authorities cited this would be true even if after the coming in of the answer the decision of the case had necessarily depended upon the question whether the Commission had power to make the order. But in the case at bar, this was not the situation. The defendant relied not only upon the Commission's order but also upon the claim that its method of car distribution was justified by paragraph (12). If the court had sustained this claim, there would have been no occasion to consider the Commission's order, and the case might therefore have proceeded to a final decree without the decision of any question arising upon that order.

We submit therefore that it is impossible to regard the case at bar as a case brought to set aside or enjoin an order of the Commission, and equally impossible to regard the application for an injunction in accordance with the prayer of the bill as an application for an injunction against the order of the Commission.

Neither the case of *North Dakota* v. *Chicago &*

Northwestern Railway Company, decided January 22, 1922, nor *Illinois Central R. R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, cited in the brief for the United States, is in point. They were both cases in which the bills filed directly and expressly attacked orders of the Commission, and the language quoted by counsel from the opinion in the former case cannot be extended to apply to a case in which the plaintiff, being the "absolute master of the jurisdiction he will appeal to," has seen fit not to make such an attack.

It is also contended by appellee that if this is not a suit which must be heard by three judges, it is a suit which involves the reasonableness of the Commission's rule and therefore within the exclusive original jurisdiction of the Commission. This contention also is untenable. The suit is one to enforce a specific statutory right. The only question as to the Commission's order which it presents is whether the Commission had any power or authority to make the order, and it is manifest that the Commission cannot have exclusive original jurisdiction of that question.

The Appellee's Position as to the Construction of Paragraph (12).

The argument of counsel for Appellee in support of their claim that paragraph (12) embodies the rule in the *Traer* case may fairly be said to be remarkable chiefly for what it does not say. It absolutely ignores the fact that the car shortage provision contains as its principal element a peremptory and unqualified direction to apply mine ratings. It does not deny or discuss the evils which we have shown to be the result of the assigned car practice as sanctioned by the rule in the *Traer* case, and it preserves a discreet silence as

to the statement of the House Committee that paragraph (12) was designed to avoid the recurrence of those evils, while it is arguing that the substitution of paragraph (12) for the Senate provision shows that Congress did not intend to take any action against assigned cars. It is hardly possible to regard this procedure as any thing but a tacit confession of inability either to reconcile these facts with the claim that paragraph (12) is declaratory of the rule in the *Tracy* case, or to show that they have no bearing on that claim, and we submit that counsel's argument is, to this extent, a significant and valuable indorsement of the position taken in Point I of our original argument.

On the other hand, counsel have referred in their argument to one matter which seems to be irrelevant and to have a tendency to confuse the question before the court. They discuss at some length the question whether our theory of the construction of paragraph (12) does not involve an invasion of the rights of private car owners. We do not think the case at bar requires the consideration of this question. The bill does not charge that privately owned cars have been distributed by defendant as assigned cars, and it would seem that the question whether privately owned cars are within the class of cars available for transportation of coal designated by paragraph (12), should be left to be determined in some case in which privately owned cars are involved. Whether they are within the statute or not may depend upon considerations which cannot be adequately presented at this time.

The only question presented by this record—the status of railway fuel cars—does not depend in any way

upon the decision as to the status of privately owned cars. If the court holds that the statute prescribes a ratable distribution of the cars to which it applies, there can be no question but railway fuel cars are subject to that rule. That Congress intended it to have at least that scope, is shown by the statements in the report of he House Committee to the effect that the order of the Director General, which prohibited the use of assigned cars for railway fuel, was the basis of paragraph (12), and a decision of this court giving paragraph (12) that effect will not foreclose an independent consideration of the question whether it also includes privately owned cars when a case is presented which raises that question.

Counsel assert that if the railroads are not permitted to use assigned cars they will be unable to obtain the coal necessary to their operation without confiscations of commercial coal. This is doubtless true if they continue to depend upon buying coal when and as they need it. But why should they do so? It is well recognized that one of the worst evils of the coal industry is the seasonal character of the demand, and the public is constantly urged not only by coal operators, but by the Government, to accumulate reserve stocks for the winter during the period of ample car supply. Is there any reason why the railroads should not adopt this reasonable precaution, and thus not only avoid the necessity of using assigned cars or of confiscating coal in transit, but contribute largely to the elimination of the recurrent coal car shortage?

Finally, counsel say that paragraph (12) construed as requiring ratable distribution is not a workable rule. The answer is that it is precisely as workable as it would be if it were construed as requiring a pre-

ferential distribution. What is a "car" within the meaning of the provision; whether a ratable distribution from day to day or from week to week is a substantial compliance with the statute—these and other matters are not specifically provided for. In other words the statute may require further construction or it may become necessary for the Commission to fill in the details. That, indeed, is the proper function of the Commission—to fill in the details of general statutory provisions so that the intention of Congress may be effectuated, not to set them aside.

The Argument of Counsel for Appellee as to the Construction of Paragraph (15).

So far as the case for appellee is based on the Commission's notice of April 15, 1920, it depends absolutely upon the proposition that paragraph (15) deals with the distribution of cars among shippers. Counsel appear to have repudiated the view taken by the Court of Appeals that clause (d) of that paragraph justified the Commission's order (Appellee's Brief, p. 50), and to limit their claim to clause (a). Their contention is that "car service" which is the sole subject-matter of clause (a), includes the distribution of cars among shippers, and that it authorized the Commission to set aside the car distribution rules of appellee.

The primary objection to this is that "car service" does not include the distribution of cars among shippers. Counsel's claim to the contrary rests wholly upon the use of the word "distribution" in the definition of "car service" in paragraph (10). We have shown in our original brief (pp. 65-73) that the history of car service legislation demonstrates that the word

"distribution" in paragraph (10) relates only to the distribution of cars among carriers and not at all to car distribution among shippers, and counsel have attempted no reply to that argument.

But it is unnecessary to rely upon the historical argument. Congress has made the same distinction in terms in the present act. Paragraph (11) provides that the carriers shall "establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service." Paragraph (12) provides that it shall "*also* be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it." If "car service" includes the distribution of cars among shippers, this provision was absolutely superfluous since the provision quoted from paragraph (11) would require that distribution to be just and reasonable. The fact that Congress prefaced the provision in paragraph (12) with the adverb "also" shows that it was proceeding to a new subject-matter, and the fact that it enacted it at all shows clearly that it did not consider its subject-matter to be covered by the term "car service."

But even if car service is to be considered as including car distribution among shippers, and clause (a) as authorizing suspension of car distribution rules, the appellee's case is not helped. We are not concerned with appellee's car distribution rules in this case. The sole question is whether what appellee did in the distribution of cars conformed to the car shortage provision of paragraph (12). Neither a car distribution rule nor the suspension of such a rule could in the slightest degree alter or impair the obligation of appellee to obey the specific provision of paragraph (12).

In closing we venture to direct the court's attention to the fact that while the Court of Appeals, the Commission and the appellee all agree in upholding appellee's use of the assigned car, the reasons of the Court of Appeals for that conclusion are irreconcilable with those of the Commission, and are not accepted by counsel for appellee. We submit that this conflict tends strongly to confirm the position taken in our original brief that the advocates of the assigned car are reading their theories into the statute and not finding them there.

RUSH C. BUTLER,
ERNEST S. BALLARD,
HERBERT POPE,
Solicitors for Appellant.

FRANK E. HARKNESS,
Of Counsel.